The Legislature has made the results of these tests and the findings of the experts who conduct them on the question of paternity receivable in evidence,[3] not only in bastardy proceedings,[4] but also "Whenever it shall be relevant in a civil or criminal action or proceeding to determine the identity of any person. . . ."[5] In addition, this act provides that the court shall, on motion, order blood-grouping tests to be made by competent persons, and makes refusal of any party to submit to the test admissable in evidence. New York and Wisconsin have similar statutes.[6]

In the recent case of *State ex rel. Slovak* v. *Holod, Jr.*,[7] the trial court refused a request to charge that the results of tests which excluded the defendant as the possible father were conclusive of the question. The Court of Appeals for the Fifth District, in affirming this action, recognized the value of the evidence, but evinced a reluctance to give it conclusive weight. The court explained its attitude with the fact that many "natural laws" once thought to be infallible have been found to be inaccurate. Further, "It transgresses the usual rule that positive evidence is ordinarily of greater weight than negative proof." While this opinion seems less favorable to the use of blood-grouping tests than does that of *State* v. *Wright*,[8] it will be seen that a different question was involved. In the latter case, the evidence was considered of sufficient weight to justify the granting of a new trial. In this case, the court was asked to make it conclusive. It is not unlikely that, had the problem been similar to that of the *Wright* case, the same conclusion would have been reached.

J. R. E.

INSURANCE

Insurance — Insurance of Limited Interests — Effect of Valued Policy Law

The plaintiff was the owner of an undivided one-third interest in certain property. After an examination of the property, the defendant insurance company issued a policy which apparently covered its full value. While this policy was in effect the property was totally destroyed by fire. The Court of Appeals held that the plaintiff was entitled to recover the entire amount of the policy.[1]

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[3] Act of May 25, 1939, 118 Ohio Laws H. 213.

[4] Ohio General Code, sec. 12122-1.

[5] *Id.*, sec. 12122-2.

[6] New York Civil Practice Act, sec. 306-a, New York Laws, 1935, Ch. 196; Wisconsin Laws, 1935, Ch. 351.

[7] 63 Ohio App. 16 (1939).

[8] *Supra*, note 1.

[1] *Summers* v. *Stark County Patrons Mut. Ins. Co.*, 62 Ohio App. 73 (1939).

The plaintiff, as owner of one-third the fee, clearly had an insurable interest.[2] But he is not the sole and unconditional owner of the property as required under the standard fire insurance policy. However, since the agent of the company was informed as to the nature of the plaintiff's interest when the contract was made, the great weight of authority would say that the company is estopped from later denying that plaintiff was the sole and unconditional owner.[3] Furthermore, the provision of the Ohio General Code in section 9583 that only an increase in the risk by the insured, or fraud on the part of the insured, will defeat the policy, would aid the plaintiff in this respect. Therefore, the policy would not be avoided on this ground.

The insured may insure his own interest, or by acting as the agent for the others holding interests therein, he might insure the whole property.[4] The facts as set out by the court, however, would seem to indicate that such was not done, and that the plaintiff was insuring the whole property for his own benefit. The question now is, whether, if the plaintiff pays the premium for insurance covering the whole property, he may recover the full value thereof, in the event a total loss occurs.

The purpose of the insurance contract is indemnity and not profit.[5] When the insured has recovered to the extent of his loss, he is entitled to no more. It should be noted, however, in cases where the insurer has taken a large premium, and there is a question as to what will constitute full indemnity, the benefit of the doubt is usually resolved in favor of the insured. Thus, a life tenant has been allowed to recover the full value of the property.[6] In such a situation the insured is usually a widow who has suffered the loss of a home. Adequate replacement cannot be made by giving her a sum of money based on her life expectancy, as some courts have done.[7] For the same reason, one having a homestead interest has been allowed a full recovery.[8]

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[2] In VANCE, INSURANCE (2d Ed. 1930) sec. 50, an insurable interest is defined as follows: "A person has an insurable interest in property when he sustains such relations with respect to it that he has a reasonable expectation, resting upon the basis of legal right, of benefit to be derived from its continued existence, or of loss or liability from its destruction."

[3] *Forward* v. *Continental Ins. Co.*, 142 N.Y. 382 (1894); *Welch* v. *Fire Ass'n of Phila.*, 120 Wis. 456, 98 N.W. 227 (1904); *Trustees of St. Clara Female Academy* v. *N. W. Nat. Ins. Co.*, 73 N.W. 767 (Wis. 1898); *Clawson* v. *Citizen's Mut. Fire Ins. Co.*, 121 Mich. 591, 80 N.W. 573 (1899).

[4] *Trade Ins. Co.* v. *Barracliff*, 45 N.J.L. 543, 46 Am. Rep. 792 (1883).

[5] *Harrington* v. *Agr. Ins. Co.*, 179 Minn. 510, 229 N.W. 792, 68 A.L.R. 1343 (1930); *Larner* v. *Commercial Union Assur. Co.*, 127 Misc. 1, 215 N.Y.S. 151 (1926); *In re Clover Ridge Planting and Mfg. Co.*, 178 La. 302, 151 So. 212 (1934).

[6] *Convis* v. *Citizen's Mutual Fire Ins. Co.*, 127 Mich. 616, 86 N.W. 994 (1901); *Andes Ins. Co.* v. *Fish*, 71 Ill. 620 (1874).

[7] *Beckman* v. *Fulton Co. Farmer's Mut. F. Ins. Ass'n*, 66 App. Div. 72, 73 N.Y.S. 110 (1901); *Doyle* v. *Amer. F. Ins. Co.*, 181 Mass. 139, 63 N.E. 394 (1902).

[8] *Merritt* v. *Farmers' Ins. Co.*, 42 Iowa 11 (1875).

In the principal case the value of the plaintiff's interest is more exactly ascertainable. The payment of the value of his one-third interest as measured by the total value of the property would fully indemnify him, and in absence of statute, that is all he would recover.[9]

Ohio, like many other states,[10] has a valued policy statute. This statute, Ohio G.C. sec. 9583, provides in part: "A person, company, or association insuring any building or structure against loss or damage by fire or lightning, by renewal of a policy, shall cause such building or structure to be examined by his or its agent, and a full description thereof be made, and its insurable value fixed by him . . . in case of total loss, the whole amount mentioned in the policy or renewal upon which the insurer received a premium, shall be paid." Thus, for example, under this statute an insurance company insuring property for $9000 could not later go behind the policy to show that its actual worth was only $6000.[11]

The usual statement as to the purpose of this statute is that it is intended to reduce losses by exacting of insurance companies reasonable diligene and care in avoiding improper risks and over-insurance.[12] Most experts believe, however, that the opposite result is reached.[13]

Does this statute apply to the owner of a one-third interest in property? The court in the principal case held that it did. It must be admitted that a majority of cases that have been decided under the valued policy laws are in accord,[14] and it is easy enough to reach this decision by a literal construction of the statute. Then would the court apply it to the owner of a one one-hundredth interest, to the situation where the insured is the owner of a single share in a large corporation? Can a line be drawn, and if so, where? It would seem more reasonable to construe the statute as setting the conclusive valuation of the property which could not later be challenged by the insurer, but not operating as a foreclosure of the issue of the value of the insured's interest. Under the holding of the principal case if all three owning an interest insured the property as did the plaintiff, a recovery of $6000 would be allowed on property

[9] *Amer. Ins. Co.* v. *Porter*, 25 Ala. App. 250, 144 So. 129 (1932); *Ins. Co.* v. *Hammer*, 2 Ohio St. 452 (1853); *Burrows* v. *Farmers' Alliance Ins. Co.*, 111 Kan. 358, 207 Pac. 433 (1922).

[10] Since the adoption of the first valued policy law by Wisconsin in 1874 twenty-three other states have enacted statutes of the same general tenor.

[11] *Schild* v. *Phoenix Ins. Co.*, 6 Ohio N.P. 134, 8 Ohio Op. 45 (1899) where the court would not permit insurer's claim that property was worth $989 when it had been valued in the policy at $1,000.

[12] *Ins. Co.* v. *Leslie*, 47 Ohio St. 409, 24 N.E. 1072 (1890).

[13] HARDY, RISK AND RISK-BEARING (rev. ed. 1931); 302; RIEGAL AND LOMAN, INSURANCE PRINCIPLES AND PRACTICES (rev. ed. 1929) 324-325; Huebner, FIRE INSURANCE in ENCYCLOPEDIA OF THE SOCIAL SCIENCES (Vol. VI, 1931) 256-257.

[14] *Hilliard* v. *Caledonia Ins. Co.*, 7 Ohio N.P. 561, 5 Ohio Dec. 576 (1895); *Hubbard* v. *Austin*, 6 Ohio N.P. 249, 8 Ohio Dec. 111 (1899); *Ins. Co.* v. *Leslie*, 47 Ohio St. 409, 24 N.E. 1072 (1890).

worth only $2000. Under the suggested construction, the property would be held to be worth $2000, but the insured, who insured only his interest therein, would recover $667, the actual value of his interest. This would seem to be more consistent with both the purpose of the statute, and the principle of indemnity upon which insurance is based.

P. E. S.

INSURANCE — SUBROGATION OF INSURANCE CO. TO CLAIMS AGAINST THE TORT FEASOR

In many kinds of insurance a company which has paid a claim under the policy may maintain an action against the tort feasor who was responsible for the loss. While the policy often expressly provides for subrogation, the right exists without a contract and is said to be based upon dictates of equity and conscience.[1] Among those policies which provide for subrogation of the insurer to the rights of the insured, including those in the form of the New York standard, the insured's rights must be measured solely on the terms of such provisions.[2] Subrogation is a basic doctrine of suretyship and its extension to insurance was founded on the principle that insurance is a contract of indemnity.[3] Consequently the rationale of the courts in determining whether such a right exists is to tag a particular type of insurance indemnity, or non-indemnity protection. Hence it has been applied without question to fire insurance.[4] Since the right of subrogation grows out of the principle of indemnity, it follows that the insurer is not entitled to subrogation until he has paid the insured's claim or until the insured has been fully indemnified for his loss. The recent Ohio case of *McConnell* v. *Conway*[5] concluded, "an insurer, having paid the amount of a policy issued on a building destroyed by an incendiary, will not be subrogated to the claim of the insured against the wrongdoer, unless and until the insured has been indemnified fully for his loss." This is illustrative of the court's reliance upon the relation of subrogation to indemnity and its use as a vehicle for problems arising under this doctrine.[6] Although there have

[1] *Am. Central Ins. Co.* v. *Weller*, 106 Or. 494, 212 Pac. 803 (1923).

[2] *Home Ins. Co.* v. *Hartshorn*, 128 Miss. 282, 90 So. 1 (1922); *Williams & Miller Gin Co.* v. *Baker Cotton Oil Co.*, 108 Okla. 127, 235 Pac. 185 (1925).

[3] *Newcomb* v. *Cincinnati Ins. Co.*, 22 Ohio St. 382, 10 Am. Rep. 736 (1872); *Phenix Ins. Co.* v. *Pennsylvania R.R. Co.*, 134 Ind. 215, 20 L.R.A. 405, 33 N.E. 970 (1892); PATTERSON, ESSENTIALS OF INSURANCE LAW, (1935) p. 119.

[4] *Baltimore Am. Underwriters of Baltimore Am. Ins. Co. of N. Y.* v. *Beckley*, 195 Atl. 550 (Md., 1937); *Norwich Union F. Ins. Soc.* v. *Stang*, 18 Ohio C.C. 464, 9 Ohio Cir. Dec. 576 (1897); *Sun Oil Co.* v. *Ohio Farmers Ins. Co.*, 15 Ohio Cir. Ct. 355, 8 Ohio Cir. Dec. 145 (1898).

[5] 62 Ohio App. 335, 23 N.E. (2d) 970, 15 Ohio Op. 508 (1939).

[6] *Svea Assur. Co.* v. *Packham*, 92 Md. 464, 48 Atl. 35, 52 L.R.A. 95 (1901).